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February 6, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; WC Docket No. 01-338 (*Triennial Review).*

Dear Ms. Dortch:

Covad has consistently advocated that the Commission require incumbent LECs to provide unbundled access to the loop plant, regardless of the material out of which the loop is made or the transmission technologies incorporated into the loop. Covad has conclusively shown that the incumbent LECs' arguments about "investment disincentives" resulting from unbundling of hybrid fiber-copper facilities ring hollow. Specifically, Covad has demonstrated the billion-dollar savings in capital expenditures and operating expenses the RBOCs enjoy from their fiber deployments.[1] Covad has also shown that, where state commissions have required the RBOC to provide unbundled access to a "broadband UNE" over fiber-copper facilities, the RBOC has continued to aggressively roll-out its fiber deployment.[2] In light of these facts, there is no doubt that requiring the incumbent LECs to provide unbundled access to the full transmission capabilities of the loop plant, regardless of whether the loop includes optical or packet transmission capabilities, will not disincent incumbent LEC fiber deployment. Moreover, Covad remains hard pressed to see how removing unbundling requirements, and thereby removing competitive pressure, will in any way incent the incumbent LECs to invest more in their networks.[3]

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[1] SBC has publicly stated that its Project Pronto deployments will yield annual cost savings of $1.5 billion by 2004. *See SBC Announces Sweeping Broadband Initiative*, SBC Investor Briefing, at 2 (October 18, 1999).

[2] *See*, *e.g.,* Letter from Praveen Goyal, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC 01-338 (dated Dec. 18, 2002).

[3] Indeed, the history of ADSL deployment before and after the Commission's 1999 *Line Sharing Order* provides ready confirmation of the principle that less unbundling equals less broadband deployment by the incumbent LECs. Although DSL technology was available for well over a decade prior to the 1999 *Line Sharing Order*, the incumbents made hardly any effort to roll it out. As shown by the Commission's 706

Nonetheless, as a means of addressing the incumbent LECs' hollow "investment disincentive" arguments, the Commission appears to be considering imposing a "cap" on the level and type of bandwidth that competitors will be able to receive over hybrid fiber-copper facilities for the provision of broadband telecommunications services to residential end users. Covad maintains strong reservations over the imposition of such a cap. Whatever cap the Commission devises will necessarily be based on the static technologies of today. The incumbent LECs most commonly choose to offer only unspecified bit rate ADSL services up to 1.5 MBps over their remote terminal installations, even though those facilities remain technically capable of several other flavors and speeds of DSL. With simple modifications, such as reconfiguring the permanent virtual circuit to the central office and installing a different line card,[4] the incumbents could easily choose to offer different service categories without making any significant sunk investment in loop plant. It would make no sense for the Commission to hobble competitors by limiting them to the technologies of today, while freeing the incumbents going forward to monopolize the markets for superior services using newer technologies.

Covad submits that any bandwidth cap developed by the Commission will be incapable of keeping pace with developing loop transmission technologies as they evolve. As a result, competitors may become frozen out of the market, while the incumbents remain free to monopolize the provision of superior broadband services using newer transmission technologies – without making any significant sunk investment in network plant.[5] The Commission must also remain mindful of the very real danger that the incumbents will face little competitive pressure to make mass market deployments of new loop transmission technologies while competitors remain hobbled by a bandwidth cap. Instead, the incumbents will likely roll out new subscriber line transmission

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data, at the end of 1999 there were only 115,000 ADSL lines in service. Today, three years after the *Line Sharing Order*, there are nearly 6 million ADSL lines in service.

[4] In fact, the ATM permanent virtual circuit established between equipment in the remote terminal and central office is technically capable of a number of service categories apart from unspecified bit rate service. These service categories, defined in the ATM traffic management specification, include constant bit rate, real-time variable bit-rate, non-real-time variable bit-rate, available bit-rate and guaranteed frame rate. These different services offer varying levels of quality of service for real-time (e.g., voice, video) and non-real time (e.g., data file transfer) applications. *See* "Traffic Management," Approved Specifications, available at http://www.atmforum.org/standards/approved.html#uni.

[5] Already, a number of technologies, such as ADSL2 and ADSL+, are under consideration in industry standard-setting bodies, offering improved bandwidth and range over existing ADSL technologies. *See* "Next Generation ADSL Standard Presentation," available at http://www.dslforum.org/aboutdsl/ADSL2_introduction2002.ppt, and "DSL Standards Developments Presentation," available at http://www.dslforum.org/aboutdsl/DSL_Standards_Dev_2002.ppt. In addition, emerging SHDSL standards enhance symmetric DSL services with a 3-4 kft increase in loop length. *See* white paper entitled, "Symmetric DSL," available at http://www.dslforum.org/aboutdsl/SHDSL_wp.pdf.

technologies in the same fashion as their ISDN and DSL deployments of yesteryear – targeted to niche high-end markets, at prices set far above cost. In other words, if the Commission allows the incumbent LECs to monopolize broadband services in the future, it should expect them to act like exactly what it will have made them: monopolies.

The Commission must remember that the scope of the problem created by a bandwidth cap will only grow over time. In fact, the RBOCs have reported substantially accelerated remote terminal deployments since 2000. Specifically, at the end of 2001, BellSouth reported that 90% of its customers were located within 12,000 feet of fiber optic cable.[6] SBC reported that during 2001 it had more than doubled the number of its remote terminal installations to over 5,800, reaching a total of 25 million customer locations.[7] Verizon meanwhile had reported that it had deployed broadband to 79% of its access lines.[8] Since the time the BOCs made these admissions, the number of their remote terminal installations can only have grown. Thus any bandwidth cap devised by the Commission would allow the incumbent LECs to continue monopolizing an ever-growing share of the market for broadband services.

Accordingly, Covad urges the Commission to refrain from imposing any kind of set bandwidth cap on the level and type of transmission competitors may access over loop facilities. Indeed, Covad remains hard pressed to see how any kind of exemption from unbundling, and therefore from competitive pressure, will incent greater network investment by the incumbents – a view recently acknowledged even by one RBOC.[9] Nonetheless, Covad requests that to the extent the Commission feels the need to satisfy the incumbent LECs' investment incentive arguments it explore more narrowly tailored approaches than a bandwidth cap. Specifically, Covad believes that Corning Cable Systems' request for an exemption from unbundling for full fiber-to-the-home deployments represents a much more narrowly tailored approach than an across-the-board bandwidth cap, allowing the incumbents an exemption from unbundling only where, according to Corning, they make significant net sunk investments in network plant.[10] Although Covad continues to support the principle that loop plant must be

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[6] *See* BellSouth 2001 10-K report. In fact, in recent data request responses submitted to the Tennessee Regulatory Authority, BellSouth indicated that as of May 30, 2002, 70.3% of its remote terminals state-wide were fed by digital loop carrier, accounting for 38.5% of its access lines state-wide.

[7] *See* SBC 4Q 2001 Investor Briefing, January 24, 2002.

[8] *See* Verizon 4Q 2001 Investor Quarterly, January 31, 2002.

[9] At a recent Precursor Group conference, Verizon CEO Ivan Seidenberg admitted that Verizon was not likely to boost its capital spending in response to a favorable FCC ruling in the Triennial Review. *See* TR Daily, February 5, 2003.

[10] *See* Letter from Larry Aiello, President and CEO, Corning Cable Systems, to Chairman Michael K. Powell, Federal Communications Commission, in WC 01-338, dated Feb. 3, 2003.

unbundled regardless of the composition of the loop, Covad believes that Corning's proposal represents a much more limited intrusion on the rights of competitors to access loop facilities in the residential market than the imposition of a bandwidth cap.

To the extent the Commission nonetheless decides to proceed with the imposition of a bandwidth cap for competitive access to residential loop facilities, Covad urges the Commission to make clear that the incumbents must continue to comply with the provisions of section 252(a), and negotiate in good faith over competitor access to loops including newer transmission technologies. The Commission should also make clear that, notwithstanding any bandwidth cap for residential services, incumbents remain under a statutory duty to provide competitors with non-discriminatory access to unbundled loops. As the marketplace for loop transmission technologies develops and enhanced transmission technologies become most efficient and widely available, this duty would include the provision of loop transmission beyond the bandwidth cap specified by the Commission. To this end, Covad strongly urges that the Commission make clear that, notwithstanding any finding in the *Triennial Review Order* that competitors are impaired without access to loop transmission technologies for residential end users up to a specified level of bandwidth, as the efficiency and cost of widely available loop transmission technologies evolve, the level and type of bandwidth without which competitors are impaired over such facilities may correspondingly change. Covad also urges the Commission to make clear that, upon a particular showing of evidence that the marketplace for loop transmission technologies has evolved in such a manner, state commissions may find that competitors are impaired without access to the evolving capabilities of loops incorporating such transmission technologies.

Respectfully submitted,

___/s/ Praveen Goyal_____

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